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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-128

MARVIN MANDEL, Governor of Maryland, ET AL.,
Appellants,

v.

BRUCE BRADLEY, ET AL., *Appellees*

On Appeal from the United States District Court
for the District of Maryland

BRIEF FOR APPELLEES

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BRIEF FOR APPELLEES

QUESTION PRESENTED

Whether Maryland Code (1976 Replacement Volume), Article 33, Sec. 7-1(e) [1] deprives the appellee

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[1] On March 16, 1976, § 7-1(e), was amended. The deadline for filing of certificates of candidacy and petitions now appears at § 7-1(i). The substance of the provision was not changed, however, and pursuant to § 7-1(i), the filing deadline for petitions in 1976 would have been March 8, 1976, the same as under former § 7-1(e). The Appellants, on Brief, failed to note this change and referred throughout their Brief to the statutory provision in question as § 7-1(e). For the convenience of the Court and to avoid confusion, the appellees in this Brief will refer to the challenged section as § 7-1(e). However, appellees desire to make clear that the filing deadlines which are the subject of this litigation now appear at § 7-1(i) of Article 33, not § 7-1(e).

candidate and voters of rights guaranteed to them by the First and Fourteenth Amendments to the United States Constitution in that this statute required independent candidates for statewide office to file petitions containing the signatures of 51,155 registered voters of Maryland with the county election boards on March 8, 1976, which date is 70 days prior to the primary election in Maryland and which is 239 days prior to the general election, in order for the independent candidate's name to appear on the ballot in the general election to be held in November, 1976.

STATEMENT OF THE CASE

This case involves the difficulties encountered by independent candidates in the State of Maryland who seek to have their names placed on the general election ballot by satisfying the requirements of the nomination by petition process, as provided in the Maryland Election Code.

Bruce Bradley, one of the plaintiffs in the District Court, is a voter in the State of Maryland and is registered as an independent. In the Spring of 1975, Mr. Bradley decided to run as an independent candidate for the United States Senate seat which was then held by Honorable J. Glenn Beall. (Tr. 64).[2]

In order for the name of an independent candidate to appear on the general election ballot, the independent candidate must comply with the requirements of the nomination by petition process. The independent candidate does not take part in the primary election

[2] References to the Appendix to the Jurisdictional Statement will be cited as "AJS." References to the Appendix which accompanied Appellants' Brief will be cited as "A." References to the Transcript of the Hearing of May 12, 1976 will be cited as "Tr."

process. The burdens imposed by the nomination by petition process are found at Section 7-1 of the Maryland Election Code.[3] The net effect of this provision was that in 1976, an independent candidate for statewide office was required to file no later than March 8, 1976[4] his or her certificate of candidacy to which had been appended the signatures of 51,155 registered voters of the State of Maryland. If the independent candidate succeeded in performing this task, that candidate's name would appear on the ballot in November, 1976. If the independent candidate did not carry this burden, the name would not appear on the November ballot.

A partisan candidate who sought nomination by means of the primary election process for the 1976 election must also have filed a certificate of candidacy on March 8, 1976. However, the partisan candidate was not required to append any signatures to his certificate of candidacy. The mere filing of the partisan candidate's certificate of candidacy guaranteed the partisan candidate a place on the primary election ballot. §§ 4A-1, 4A-3.

[3] Maryland Code (1976 Repl. Vol., 1976 Cum. Supp.) Art. 33, § 7-1. AJS. 19a-22a. Unless otherwise noted, all references to statutory sections of the Maryland Code are references to Article 33, the Maryland Election Code.

[4] This date is provided by statute and is required to be seventy (70) days prior to the day on which the primary election is held. § 7-1(e). The date of the primary election in Maryland in 1976 was May 18, 1976. The date for the primary election is set by statute as the third Tuesday in May in presidential election years. § 5-2. In all other years, the primary election date is the second Tuesday after the first Monday in September. *Id.* Thus, in non-presidential election years, the dates for filing of certificates of candidacy fall in July.

As an independent candidate, Mr. Bradley commenced in the Spring and Summer of 1975 to organize his campaign and signature gathering drive. (A. 16A, 20A). The signature gathering drive was hampered substantially by the difficulties of maintaining a politically oriented activity in the Fall and Winter of 1975-76, a time far in advance of the high public interest in national and statewide politics. The problems included difficulties maintaining a campaign staff (A. 20A), difficulties in developing coverage of the campaign by the printed and electronic media (A. 21A) and difficulties in arranging personal appearances for candidate Bradley (A. 27A-30A).

Despite these difficulties, Mr. Bradley tendered his certificate of candidacy to the State Administrative Board of Election Laws on March 8, 1976 with 53,239 signatures appended to the certificate. However, subsequent to the signature verification process, the State Administrative Board of Election Laws notified Mr. Bradley that only 42,049 "valid" signatures [5] had been appended to the certificate.

Since that number fell short of the 51,155 necessary for nomination, the Administrator of Election Laws stated on April 15, 1976 that Mr. Bradley's name would not appear on the ballot in the November general election.

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[5] § 7-1 specifies requirements which must be satisfied in order for a signature to be deemed "valid" for the petition process. These requirements include, *inter alia*, that the registered voter print his name beneath his signature, that a resident must sign only that petition sheet bearing the name of that voter's county of residence and that each petition sheet be notarized by a notary public who knows the signator to be a registered voter of the designated county.

Mr. Bradley commenced negotiations with various representatives of the State in order to reach an accommodation concerning Mr. Bradley's candidacy and place on the ballot. Since such an accommodation could not be reached, Mr. Bradley and other registered voters of the State of Maryland instituted suit in the Federal District Court for the District of Maryland on April 30, 1976. Plaintiffs below claimed, *inter alia*, that the remote March 8 deadline for the filing of the certificate of candidacy and the required 51,155 signatures, falling 70 days before the primary election and 239 days before the general election, placed an unreasonably heavy burden on Bradley to have his name placed on the ballot and thus violated the Plaintiffs' First and Fourteenth Amendment rights. (A. 3A-14A).

On April 30, the day suit was filed, an Order was entered with the consent of all parties which permitted Bradley to collect additional signatures and to file the same with the Defendants until May 18, 1976. However, the Order did not require the Defendants to take any action with respect to the signatures until further Order of the Court. (A. 14A-15A).

A three judge court was duly convened on May 12, 1976 and the matter came on for hearing on the motion for preliminary injunction. At the hearing, evidence was received from all parties.

Plaintiffs submitted affidavit testimony, subject to cross-examination, which established the burdensome nature of the early filing deadline.

Plaintiff John F. Falconer was campaign manager for the Bradley campaign. Mr. Falconer testified that his primary initial duty in the campaign was to orga-

nize and operate a successful signature gathering drive. (A. 20A). In this regard, Mr. Falconer testified that it was difficult to recruit volunteers for the campaign since few persons could feel the immediacy of collecting signatures in the Fall and Winter of 1975 for an election to be held in November, 1976. (A. 20A). During the petition gathering period, the campaign recruited and lost three petition drive chairpersons, two schedulers and five county chairpersons. The common denominators for the loss of these persons were, first, the frustrations of expending a large effort in a political campaign during a time period remote from the actual election, and, second, the pressures resulting from conducting a petition drive in adverse winter weather conditions. The lack of media attention during the signature drive further demoralized the campaign staff (A. 20A-21A). The campaign made numerous efforts to attract coverage from both the printed and electronic media. The normal response to these requests was that the Bradley campaign would be covered along with the primary election campaign—a time which occurred after the filing deadline for petitions. In Mr. Falconer's estimation, the lack of media coverage severely hampered the campaign in three ways: 1) damage to fundraising efforts; 2) demoralization of campaign staff; and 3) lack of voter knowledge of Mr. Bradley and his campaign. (A. 21A). With regard to fundraising, it should be noted that at the time suit was filed, the 45 day period *following* the March 8 filing deadline had been the most productive period for fundraising purposes. (A. 22A).

The essence of Mr. Falconer's testimony was that the early filing deadline was damaging to the campaign

organization, nearly eliminated the amount of media coverage the campaign would have received if it were conducted later in the year, and diminished the campaign contributions which were needed to conduct a forceful, full-scale petition drive.

Susan Madison was one of the schedulers for the Bradley campaign. She filed an affidavit in support of the motion for temporary restraining order and preliminary injunction (A. 27A-30A) and was a witness at the hearing below. Ms. Madison testified that her duties included arranging for Mr. Bradley's public appearances. She testified that extreme problems were encountered in scheduling the candidate for public appearances before civic and other groups in the Winter of 1975-76. Ms. Madison indicated that she explained the petition process to her target groups and that she pointed out the time frame in which an independent candidate must operate in Maryland. Despite the fact that the time during which Mr. Bradley needed extensive exposure to the public was the period preceding the March 8 filing deadline, the vast majority of groups contacted indicated that they would allow Mr. Bradley to speak to the group only during their previously scheduled political meetings and "candidates' nights" to be held during the months of March, April and May, 1976. Accordingly, Mr. Bradley would be allowed to appear before these groups only after the filing deadline for nominating petitions had passed. Typical of the groups contacted by Ms. Madison were women's clubs, community centers, chapters of the League of Women Voters, senior citizens groups, chambers of commerce and student associations. Ms. Madison further testified that after the March 8 deadline, as the primary election campaigns

were increasing in tempo, many groups requested that Mr. Bradley make appearances before them. These appearances of course would in no way aid the theretofore completed petition drive.

Plaintiff Bradley filed an affidavit below (A. 15A-19A) and was a witness at the hearing. Mr. Bradley stated that the petition drive which must be concluded 239 days before the general election imposed severe hardship on prospective Independent candidates. Mr. Bradley testified that the Fall of 1975 was a crucial period for the independent candidate's petition drive since during that time, the petition drive organization must have been established and the petition drive itself must have been forcefully commenced. However, in the Fall of 1975, none of the four major daily newspapers in Maryland had even assigned correspondents to cover the United States Senate race in Maryland. No journalistic machinery was in place to cover the development of the Bradley campaign or petition drive. The candidate and his platform remained relatively unknown prior to the March 8, 1976 deadline. Bradley further testified that the March 8, 1976 filing deadline imposed on the campaign an onerous time period for an independent to commence active campaign work since it required that finances be raised and a campaign organization developed in excess of one and one-half years prior to the general election.

The State presented two witnesses at the May 12, 1976 hearing. Professor Richard Smolka testified concerning the content of Maryland's election laws and his opinions concerning the burdens experienced by an independent candidate in Maryland. (A. 32A-36A). That testimony is summarized in Appellants' Brief

at 7-9.[6] However, it should be noted that on *voir dire*, Professor Smolka admitted that he had never performed quantitative research on the relative ease of gathering petitions at various stages prior to a primary or general election and that he personally had never collected any petitions. (A. 58A-59A.)

The State also presented as a witness Willard A. Morris, State Administrator of Election Laws. He testified concerning the history of Maryland's independent candidate procedure, the events relating to the Bradley campaign's nomination by petition effort and the ability of independent candidates to gain a place on the ballot by means of the nomination by petition process. (A. 36A-49A). Mr. Morris stated that independent candidates had successfully gained ballot placement in non-presidential election years, *i.e.*, when the filing deadline is in July, and that independent candidates had achieved ballot placement for offices of less than statewide authority in presidential election years. However, on cross-examination, Mr. Morris admitted that no candidate for statewide office had ever gained ballot placement using the nomination by petition process in a presidential election year when the filing deadline for nominating petitions falls in early March for a general election to be held in November. (A. 63A.)

Mr. Morris further admitted that one other candidate for statewide office failed to append a sufficient number of signatures to petitions required to be filed on March 8, 1976 to guarantee a ballot position in November. That candidate was former Senator Eugene McCarthy.

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[6] References to Appellants' Brief filed with this Court will be cited as "Br."

At the close of the May 12, 1976 hearing, the case was taken under submission.

On May 17, 1976, the Opinion of the District Court issued. (AJS. 1a-13a). The decision will be discussed below at length. It is sufficient here to note that: (1) the District Court concluded that the March 8, 1976 termination date substantially burdened the ability of Mr. Bradley to gain access to the ballot (AJS. 6a); (2) no compelling state interest justified that burden (AJS. 6a-9a); (3) that the instant case was indistinguishable from a three judge district court case, *Salera* v. *Tucker*[7] and that the *Bradley* District Court was bound by the Supreme Court's summary affirmance of *Salera* v. *Tucker*.

On June 2, 1976, the Order of the District Court issued which declared that § 7-1(e) denied the constitutional rights of Mr. Bradley to gain a place on the ballot and denied the constitutional rights of the other plaintiffs to vote for Mr. Bradley as the candidate of their choice. The District Court afforded Mr. Bradley additional time until July 13, 1976 to seek additional signatures and ordered that the name of Bruce Bradley be placed on the ballot for the general election to be held in November, 1976 if by July 13, 1976, Mr. Bradley collected additional valid signatures to cause his total to exceed 51,155 signatures.

Mr. Bradley collected the needed additional signatures and, by letter of July 30, 1976, the State Administrative Board of Election Laws notified Mr. Bradley that his name would appear on the ballot as an independent candidate for the United States Senate.

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[7] 399 F.Supp. 1258 (E.D. Pa. 1975) *aff'd.* 424 U.S. 959 (1976).

The name of Bruce Bradley did appear on the ballot in the November general election. Mr. Bradley was defeated in that election.

SUMMARY OF ARGUMENT

I.

Section 7-1(e) of the Maryland Election Code violates the First and Fourteenth Amendment rights of independent candidates and their voter-supporters in the State of Maryland. Based upon the evidence presented, the District Court properly determined that the early filing requirements placed a substantial burden on the ability of independent candidates to gain access to the ballot. That burden is demonstrated both by the experience of the Bradley Campaign and by the history of independent candidacies in Maryland. The District Court properly considered and rejected as insufficient the purported compelling state interests proffered by the State in support of the early filing date. Burdens on the full exercise of constitutional rights must fall unless those burdens are justified by a compelling state interest and unless those burdens are the least restrictive burdens necessary to protect that compelling state interest. *See e.g., Elrod* v. *Burns,* — U.S. —, 96 S.Ct. 2673 (1976); *Buckley* v. *Valeo,* 424 U.S. 1 (1976); *Kusper* v. *Pontikes,* 414 U.S. 51 (1973). The failure of the State to establish a compelling state interest justifying the early filing deadline required the District Court to declare Section 7-1(e) unconstitutional.

II.

In its decision, the District Court properly applied the principles enumerated by this Court in *Hicks* v. *Miranda,* 422 U.S. 332 (1975). The *Bradley* District

Court was presented with a district court decision which considered facts and legal issues similar to those presented in *Bradley* and which had been summarily affirmed by this Court. *Salera* v. *Tucker,* 399 F. Supp. 1258 (E.D. Pa. 1975) *aff'd,* 424 U.S. 959 (1976). The *Bradley* District Court scrutinized *Salera* to determine if *Salera* was factually distinguishable. Only after full scrutiny of *Salera* and on investigation of the issues presented to this Court through *Salera's* opinion and jurisdictional statement did the *Bradley* District Court deem itself bound by *Salera* thus requiring *Salera's* application to the Bradley litigation.

Consequently, combined with its independent determination that the Maryland Code imposed constitutionally impermissible burdens upon independent candidates, the District Court's application of *Salera* through *Hicks* further serves to establish the correctness of its decision.

ARGUMENT

I. SECTION 7-1(e) OF THE MARYLAND ELECTION CODE VIOLATES THE FIRST AND FOURTEENTH AMENDMENT RIGHTS OF INDEPENDENT CANDIDATES AND THEIR VOTER-SUPPORTERS.

A. Applicable Principles.

Section 7-1(e) in the 1976 presidential election year required that independent candidates for statewide office file on March 8, 1976, certificates of candidacy to which had been appended the signatures of 51,155 registered voters of the State of Maryland. If the independent candidate succeeded in fulfilling this obligation, that independent candidate's name would appear on the ballot for the general election held in November, 1976. If the independent failed to file a certificate with

the required number of signatures appended, the independent candidate's name would not appear on the general election ballot.

Candidates who sought nomination for office as members of an organized political party must also have filed certificates of candidacy on or before March 8, 1976, in order for their names to appear on the primary election ballot. However, these candidates need not have appended any signatures to their certificates. The mere filing of a certificate of candidacy guaranteed that the partisan candidate's name would appear on the primary election ballot. *See* §§ 4A-1, 4A-3.

The statutory scheme suggests two areas of constitutional infirmity in the election process as it relates to independent candidates. First, the statutory scheme may be burdensome on the First Amendment rights of independent candidates in light of the substantial difficulties which face independents in qualifying for a ballot position. The right to vote for the candidate of one's choice derives from the right of association which is protected from state infringement by the First Amendment as applied to the States through the Fourteenth Amendment. *See, Williams* v. *Rhodes,* 393 U.S. 23, 30 (1968); *NAACP* v. *Button,* 371 U.S. 415, 430 (1963). Second, the statutory scheme is questionable under the Fourteenth Amendment's equal protection tenets. The statutory scheme creates two classes, independent candidates and candidates from established political parties. The right considered is access to the ballot. The burdens placed upon independent candidates in achieving a ballot position in the general election differ from those of candidates from established parties.

The burdens imposed upon independent candidates are to be subjected to "exacting scrutiny" and can be sustained only if they further a vital or compelling governmental interest. *See Buckley* v. *Valeo,* 424 U.S. 1, 58-59, 93-94 (1976); *Storer* v. *Brown,* 415 U.S. 724, 729-731 (1974); *American Party of Texas* v. *White,* 415 U.S. 767, 780-81 (1974).

Further, even if a compelling or vital state interest is identified by the State, the means used by the State to protect that interest must be carefully circumscribed so as not to unnecessarily restrict a constitutionally protected liberty. *See, e.g., Elrod* v. *Burns,* — U.S. —, 96 S.Ct. 2673, 2684-85 (1976); *Buckley* v. *Valeo, supra; United States* v. *Robel,* 389 U.S. 258, 267 (1967).

Plaintiffs submit that the District Court below properly utilized this traditional analysis of constitutional issues. It made an independent judgment on the facts presented that the early March 8 filing deadline substantially burdened Mr. Bradley's ability to gain access to the ballot. The District Court fully examined and properly rejected the purported compelling or vital state interests proffered by the State. Finally, even assuming *arguendo* that the State had established a compelling or vital interest in the independent candidate scheme which required protection, the State has totally failed to fulfill its affirmative obligation of establishing that the means chosen to protect that interest imposed the least possible restrictions on the exercise of constitutional rights.

B. The Early Filing Deadline for Independent Candidates' Petitions Places a Substantial Burden on the Ability of Independent Candidates to Gain Access to the Ballot.

Both the evidence presented before the District Court and an analysis of the history of independent candidacies in Maryland indicate that the early March filing deadline for independent candidates' certificates and supporting signatures severely impairs the ability of independent candidates to gain access to the ballot.

The evidence presented by the Plaintiffs to the District Court on the issue of the burdensome nature of the early filing deadline was primarily sponsored by three witnesses, the candidate, Bruce Bradley; the Bradley For Senate campaign manager, John Falconer; and the scheduler for Mr. Bradley, Susan Madison.

Their testimony established that the early filing deadline adversely affected the ability of the candidate to gain a position on the ballot in five primary ways during the conduct of the petition drive:

1. There was an absence of coverage by the printed and electronic media which caused the candidate, his platform and his petition drive to remain relatively unnoticed.
2. Extreme difficulties were experienced in scheduling the candidate for public appearances.
3. The petition drive organization was forced to operate in adverse weather conditions in a time frame out of synchronization with high public interest in political matters.
4. Campaign contributions were difficult to garner in this remote time frame.
5. Difficulties arose in maintaining cohesion in the campaign organization.

The testimony of Mr. Bradley (A. 17A) and Mr. Falconer (A. 21A) both referred to the absence of media coverage of the campaign, the cause of that absence, and the effect of the lack of media coverage on the campaign and petition drive.

Mr. Falconer indicated that the campaign had exerted strenuous efforts to entice media coverage of the petition drive. Hundreds of telephone calls were made to various representatives of the media in an effort to gain exposure for the campaign during the petition drive. (A. 21A). However, the normal response to those inquiries was that the Bradley campaign would be covered during the primary election campaign. Of course, the primary campaign occurs *after* the filing date for petitions; thus any media coverage at that point would in no way aid the petition drive. All four major daily newspapers serving the State of Maryland were contacted concerning their coverage of the Bradley petition drive; however, in the fall of 1975, none of these publications had even assigned a correspondent to cover the United States Senate race (A. 17A). There was an absence of adequate journalistic machinery to cover the Bradley petition drive and campaign due to the time frame in which the petition drive was forced to operate. Because of this lack of media coverage, prospective petition signers were unaware of the Bradley campaign, the Bradley platform and, most importantly, were unaware of the petition drive itself.

On brief, the State belittles the arguments of the Plaintiffs that the lack of media coverage severely impacted the campaign. (Br. 26). However, Plaintiffs respectfully submit that to deny the vital importance

of media coverage of a major political action in the twentieth century is to deny reality.

Had the petition drive been conducted in a later time frame coinciding with media interest in Maryland or national politics, *i.e.*, in the Spring or Summer of 1976, the signature gathering effort would have been substantially less burdensome.

Susan Madison, the scheduler for Mr. Bradley's public appearances, testified concerning the difficulties experienced by the campaign in arranging for public appearances for the candidate during the signature gathering effort. (A. 27A-30A). Ms. Madison testified that she expended substantial efforts in attempting to arrange for public appearances for the candidate. These public appearances were important in several aspects. First, the candidate and his platform could have gained valuable exposure. Second, the petition drive effort could have been explained to the group with the result that some of the persons in attendance would have signed the petition. Third, exposure through public appearances would have resulted in an increase in the number of volunteer staff workers for the campaign and petition drive effort.

As a direct result of the early filing deadline, these benefits did not accrue to the Bradley campaign effort. Ms. Madison contacted numerous groups, including but not limited to chapters of the League of Women Voters, student groups, senior citizens groups, chambers of commerce and institutions of higher learning. The normal response of these groups was that they would be pleased to allow Mr. Bradley to speak to the group, but not before the months of March, April and May, 1976. Mr. Bradley's appearance would take

place on a "candidates' night" or at a political forum where all senatorial candidates could speak. The time frame for the political gatherings was during the primary election campaign. Thus, Mr. Bradley could gain broad exposure to these influential groups only *after* his petition drive had been completed. The resources of these groups were as a practical matter denied to Mr. Bradley in his petition drive effort by the early filing deadline imposed by Maryland on independent candidates.

Since the petition drive was terminated by the filing of petitions on March 8, 1976, the major effort of the petition drive must occur during the Fall and Winter of 1975-76. It strains the obvious to state that gathering petitions is not a pleasant task. This unpleasantness is multiplied when the major petitioning effort takes place in adverse weather conditions. As Campaign Manager Falconer pointed out in his testimony, during the winter months the number of persons in public places is minimal. Further, it is a burden on the potential signator to stop, listen to the petitioner, and sign the petition. (A. 22A). The major efforts for the collection of signatures for the Bradley campaign was thus required to take place in a time frame remote from the primary or general election, when political awareness was low and during adverse weather conditions. (A. 22A). Had the petition drive occurred late in the year during the Spring or Summer of 1976, voter interest in the senatorial campaign would be high, more voters would be available to the petitioners in public places and the physical task of petitioning would have been less onerous with the obvious result

that more volunteer petitioners would have been available for longer periods of time.[8]

Testimony was also received that the remote time frame impacted adversely upon campaign contributions. Mr. Falconer testified that the campaign experienced severe difficulties in meeting the current expenses of the petition drive. Mr. Falconer stated that at least in part, the inability of the campaign to raise sufficient money to fund the petition drive came as a result of: (1) the time frame of the petition drive which was remote from the primary and general elections; (2) the absence of media coverage of the petition which, as discussed earlier, is caused by the remote time frame; (3) absence of political awareness of the electorate in this remote time frame. (A. 21A). Evidence of the impact on contributions of increased media coverage and political awareness is seen in the increase in contributions received by the Bradley campaign as the elections grew closer. (A. 22A). At the time suit was filed, the forty-five day period *following* the March 8 filing deadline had been the most productive fundraising period for the campaign. (A. 22A).

Finally, the remote filing deadline adversely affected the campaign organization itself. During the petition gathering period, the Bradley campaign recruited and lost three petition chairpersons, two schedulers and five county chairpersons. Campaign Manager Falconer testified that the common denominator for the loss of these persons was the demoralization of the campaign staff. This demoralization resulted from the

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[8] It is of interest to note here that the Bradley campaign was forced to employ people to gather signatures due to insufficient volunteer petitioning support in the winter months. (A. 22A).

pressures of coordinating the petition drive during the winter when weather conditions were bad and voter interest was low, and from the frustration of expending great efforts during a time period when the media devoted no time to the senatorial race, much less to the Bradley campaign. (A. 20A).

Without question the problems set forth above would have been eliminated or substantially ameliorated if the petition drive could have been conducted during a period contemporaneous with the primary and general election activities.

Equally important, the actual experience of other independent candidates in seeking ballot access through the nomination by petition process is a fact which must be considered in determining whether the statutory scheme substantially burdens the constitutional rights of independent candidates. *Storer* v. *Brown*, 415 U.S. 724, 742 (1974). An analysis of that experience indicates that the early March filing deadline constitutes a substantial burden on Maryland independent candidates.

Willard A. Morris is the State Administrator of Election Laws. He was a witness for the State before the District Court below. In his Statement to the District Court (A. 36A-49A), Mr. Morris, *inter alia*, discussed the experience of independent candidates in Maryland. He appended to his Statement a list of all independent candidates who have qualified for a place on the Maryland general election ballot during the past ten years. (A. 43A-49A). The following discussion is an interpretation of Mr. Morris' Statement, attachment and testimony.

Because of a statutory revision in 1969 and 1970, the presidential election year of 1968 was the last presidential election year in which independent candidates could file nominating petitions in the summer of the election year. In 1968 those petitions were due on July 27, 1968. (A. 41A). In 1972 and 1976, the filing deadline for independents fell in March. In non-presidential election years, *i.e.*, 1970 and 1974, the date for filing of nominating petitions fell in July.

An analysis of Mr. Morris' Statement and attached list indicates the following:

1. In 1968, with a July deadline, three independent candidates qualified for statewide office. (A. 45A).
2. In 1970, with a July deadline after imposition of the new statutory scheme, no independent candidates qualified.
3. In 1972, with a March deadline, after imposition of the new statutory scheme, no independent candidates qualified.
4. In 1974, with a July deadline, after imposition of the new statutory scheme, eight candidates qualified, though none qualified for statewide office. (A. 43A-44A).

In 1976, with a March deadline, no candidate for statewide office[9] qualified for a ballot position. In addition to Mr. Bradley's attempt, former Senator

[9] Two candidates did qualify for ballot position for offices of less than statewide authority in 1976. One of those candidates needed 3,864 signatures to qualify. The other needed 8,361 signatures. (A. 61A). Independents for statewide office needed 51,155 signatures to qualify.

Eugene McCarthy attempted and failed in Maryland in 1976 to gain a ballot position for a statewide office.

It is thus apparent that no independent candidate for statewide office has ever qualified for a ballot position when the filing deadline fell in March.

On the above summarized testimony which was presented to the District Court subject to cross-examination, the District Court found that "the March 8 termination date of the signature gathering period in the 1976 general election in Maryland substantially burdened the ability of Bradley to gain access to the ballot . . ." (AJS. 6a). The Supreme Court has not recently spoken in a definitive full opinion on the constitutionality of various deadlines for the filing of nominating petitions by independent candidates. However, some opinions of the Court have indicated that early filing deadlines impose a substantial burden on the exercise of constitutional rights and thus are constitutionally suspect.

The first indication is found in the interplay of the Court's opinions in *Williams* v. *Rhodes*[10] and *Jenness* v. *Fortson*.[11] In *Jenness*, a statutory scheme of the State of Georgia which regulated independent candidacies was considered by this Court. In Georgia, candidates who did not enter and win a political party's primary election were required to file nominating petitions on the second Wednesday in June preceding the November general election. 403 U.S. at 432. This Court upheld as constitutional that June filing deadline. However, in the discussion of the Georgia statutory scheme, this Court compared the filing deadline

[10] 393 U.S. 23 (1968).

[11] 403 U.S. 431 (1971).

burdens of the Georgia statute in *Jenness* with those of the Ohio statute in *Williams*, stating that, "Unlike Ohio, Georgia does not fix an *unreasonably early filing deadline* for candidates not endorsed by established parties." 403 U.S. at 438 (emphasis added). An examination of *Williams* shows that the filing deadline in Ohio—which had been referred to as "unreasonably early" by this Court—fell on February 7, 1968. *Williams* v. *Rhodes*, 393 U.S. at 26-27. Plaintiffs submit that the Maryland filing deadline of March 8, which falls only one month after the "unreasonably early" deadline in *Williams*, is equally unreasonable and should be rejected by this Court.

Williams also contains the second indication by this Court that unreasonably early filing deadlines are constitutionally infirm. In *Williams*, Ohio imposed a requirement that third parties have an organized party structure and conduct primaries in choosing their candidate. 393 U.S. at 25 & n.1. Ohio argued that only through the primary election process can the third party discern its most attractive candidate. *Id.* at 32-33. This Court rejected Ohio's arguments in the following language:

> The State also argues that its requirement of a party structure and an organized primary insures that those who disagree with the major parties and their policies "will be given a choice of leadership as well as issues" since any leader who attempts to capitalize on the disaffection of such a group is forced to submit to a primary in which other, possibly more attractive, leaders can raise the same issues and compete for the allegiance of the disaffected group. But while this goal may be desirable, Ohio's system cannot achieve it. Since the principal policies of the major parties change to

> some extent from year to year, and since the identity of the likely major party nominees may not be known until shortly before the election, this disaffected "group" will rarely if ever be a cohesive or identifiable group until a few months before the election. Thus, Ohio's burdensome procedures, requiring extensive organization and other election activities by a very early date, operate to prevent such a group from ever getting on the ballot and the Ohio system thus denies the "disaffected" not only a choice of leadership but a choice on the issues as well.
>
> *Id.* at 32-33.

The March filing deadline for independent candidacies in Maryland is unreasonably burdensome in a similar fashion. Mr. Bradley's testimony established that Maryland's early filing deadline required the institution of campaign and petition drive activities eighteen months prior to the general election. (A. 16A). During this early time period an independent candidate is forced to operate in a virtual void, since the important issues of the election have not galvanized and, more importantly, the identity of the independent's potential opponents is still unknown. (A. 16A). Further, the premature mandatory commencement date prevents a potential independent candidate from mounting a petition drive and independent campaign in response to an important issue which surfaces later in the election year or in response to a potential opponent who materializes during the primary election campaign. The potential independent candidate in Maryland must make his or her decision to run in a political vacuum. Accordingly, under the principles embodied in *Williams* v. *Rhodes, supra,* this constitutes a substantial burden on the exercise of constitutional rights.

The final indication provided by this Court that the March 8 filing deadline is constitutionally infirm appears in *Lubin* v. *Panish,* 415 U.S. 709 (1974). In discussing filing fees as a burden on constitutional rights, the Court took the opportunity to note the philosophical shift which is occurring in current political thought:

> Historically, since the Progressive movement of the early 20th century, there has been a steady trend toward limiting the size of the ballot in order to "concentrate the attention of the electorate on the selection of a much smaller number of officials and so afford to the voters the opportunity of exercising more discrimination in their use of the franchise." This desire to limit the size of the ballot has been variously phrased as a desire to minimize voter confusion, to limit the number of runoff elections, to curb "ballot flooding," and to prevent the overw' elming of voting machines—the modern counterpart of ballot flooding. A majority of States have long required the payment of some form of filing fee, in part to limit the ballot and in part to have candidates pay some of the administrative costs.
>
> In sharp contrast to this fear of an unduly lengthy ballot is an increasing pressure for broader access to the ballot. Thus, while progressive thought in the first half of the century was concerned with restricting the ballot to achieve voting rationality, recent decades brought an enlarged demand for an expression of political opportunity. The Twenty-fifth Amendment, the Twenty-sixth Amendment, and the Voting Rights Act of 1965 reflect this shift in emphasis.
>
> 415 U.S.* at 712-73 (citations and footnotes omitted).

The Plaintiffs subscribe to this analysis and submit that the substantial burdens imposed on independent candidacies by the Maryland statutory scheme violate not only the spirit of recent political thought, but also the Constitutional rights of the Plaintiffs herein.

We believe the conclusion is inescapable, upon the evidence presented and the principles already enunciated by this Court, that the District Court properly concluded that the remote petition filing deadline imposed by the Maryland statutory scheme "substantially burdened the ability of Bradley to gain access to the ballot . . ." (AJS. 6a). With this finding, the burden shifts to the State to establish a compelling or vital State interest which is furthered by the early filing deadline and to establish that the means taken to protect that interest are the least restrictive means available. *See, e.g., Elrod* v. *Burns,* — U.S. —, 96 S.Ct. 2673 (1976); *Buckley* v. *Valeo,* 424 U.S. 1 (1976); *Lubin* v. *Panish,* 415 U.S. 709 (1976).

C. The State Has Established No Compelling or Vital State Interests Justifying the Burdens Placed Upon the Exercise of Plaintiff's Rights.

Both in argument before the District Court below and on brief before this Court, the State has attempted to show that Maryland's remote filing deadline is justified by a variety of purported compelling state interests. Quite the contrary, however, the District Court fully and properly rejected the purported compelling state interests proferred to the District Court by the State. Furthermore, the alleged compelling state interests proferred by the State on brief are equally lacking in merit. Failure to establish a compelling state interest which is protected by the early filing

deadline requires that the burdensome March deadline be rejected by this Court. *See, e.g., American Party of Texas* v. *White,* 415 U.S. 767, 780 (1974); *Dunn* v. *Blumstein,* 405 U.S. 330, 342 (1972); *Bullock* v. *Carter,* 405 U.S. 134, 149 (1972). Each of the purported compelling or vital state interests will be considered *seriatim.*

First, it is suggested that the early March filing deadline is necessary in order to provide sufficient time for validation of the signatures appended to the petitions and to accommodate legal challenges to the determinations made by the State Administrative Board of Election Laws. Arguably, the State has an interest in determining within a reasonable time those names that will appear on the general election ballot so that the ballot and voting machines can be prepared for the general election in an orderly fashion. *See,* District Court Opinion, AJS. 6a. We readily admit that the orderly functioning of elections is a valid state interest. However, the March filing deadline does not further that interest. First, as the District Court properly recognized, the certification of candidates' names for placement on the general election ballot occurs in Maryland in late August. *See* District Court Opinion, AJS. 7a; § 8-4. Thus, it is only in late August that the fate of a potential independent candidate need be determined. As presently formulated, the Maryland statutes require that the validity of an independent's nominating petition must be determined in 35 days. *See* District Court Opinion, AJS. 7a. Thus, from an administrative standpoint, since the sufficiency of an independent candidate's nominating petition need not necessarily be determined earlier than late August, a filing deadline of mid-July for independent

candidates' petitions, a period of 35 days prior to late August, would still guarantee that the ballot certification take place in timely fashion. Further, from an administrative standpoint, it should be noted that the State Administrator of Election Laws admitted at the Hearing before the District Court that a July filing deadline for independent petitions would not create an impracticable administrative situation. (A. 63A). The final indication that a July filing deadline is not administratively burdensome is that in non-presidential election years, the filing date for independent candidates' petitions actually falls in July. (A. 62A). The proper functioning of the November general election is not a compelling or vital state interest which is protected by, or remotely related to, the March filing deadline.

A second purported vital state interest, reviewed by the District Court was the valid interest of a state in preventing a defeated primary candidate from utilizing the nomination by petition process to gain a place on the ballot. (AJS. 7a). Arguably, this could occur if a July deadline were placed on independent candidates and the party primary elections were held in May as is presently done in presidential election years. The defeated primary candidate could have two months to complete a petition drive as an independent. However, this possibility is precluded by a Maryland statutory provision which forbids the printing of a defeated primary candidate's name on the general election ballot for any office. § 8-2. Thus, the early filing deadline is not necessary to protect this state interest.

A third purported state interest requiring the determination of the sufficiency of the independent candi-

dates' nominating petitions in March is to foster "the intelligent exercise of the franchise by those voting in the primary, *i.e.*, that a voter in the primary can cast his vote more knowledgeably and effectively if he knows which independent candidates will or will not be on the final ballot." *See* District Court Opinion, AJS. 8a. The District Court properly discounted this alleged state interest by pointing out that a more significant factor to the intelligent exercise of the franchise at the primary election would be the identity of the opposing party's candidate for the general election. Since that person's identity remains unknown to the voters until after the primary election, the state interest in intelligent voting is not served by requiring that independent candidates be determined far in advance of the date of the primary election held for partisan candidates. *Id.*

At oral argument before the District Court, the State argued an additional purported compelling state interest, *i.e.*, the desirability of the state to treat partisan and non-partisan candidates alike. (Tr. 174-75). The District Court properly dismissed this spurious assertion since the Maryland statutory scheme most certainly does *not* treat partisan and independent candidates alike. *See* District Court opinion, AJS. 9a. In effect, the petition gathering process constitutes the primary election for the independent candidate—this is the mechanism by which the independent candidate gains a position on the general election ballot. Thus, March 8, 1976, which is the date for filing of certificates of candidacy by all candidates and the date for filing of independent candidates' petitions, marks the beginning of the primary contest for partisan candidates and the end of the primary contest for inde-

pendents. This is inherently *unequal* treatment and cannot be used to support an alleged compelling state interest that independents and partisan candidates be treated equally.

In its brief to this Court, the State suggests that four additional compelling state interests are present to justify the early March filing deadline. None of these additional proffered state interests survives the test of "exacting scrutiny" laid down by this Court.[12] *See Dunn* v. *Blumstein*, 405 U.S. 330, 343 (1972).

The first of the latest purported compelling state interests is that of protecting the electorate from "unscrupulous party candidates" who might support a petition drive of an independent candidate with a name or philosophy similar to that of an opponent. (Br. 35). The assumed ultimate effect would be that voters might be artificially siphoned off from the opposition candidate. (Br. 36). This argument deserves little attention. The attempt by the State to justify the early filing deadline on this premise reflects a cynicism of the political process and denigrates the sophistication of the Maryland electorate. Even if a so-called "name's-the-same candidate" (Br. 36) did gain ballot position in a Maryland election through "unscrupulous" behavior, no significant effect would result. The "name's-the-same candidate" would be branded as a sham candidate and any party candidate who prompted or fostered this tawdry conduct would be exposed to the ultimate detriment of his own campaign. Moreover, the probability of successful execution of election misconduct resulting in voter confusion as described by the State is negligible. The belated attempt of the State to justify its early filing deadline on this purported state interest fails.

[12] Indeed, their emergence at this stage of the proceedings suggests the hint of afterthought rather than of substance.

The second alleged compelling state interest relied upon in the brief of the State is the promotion of voter and candidate knowledge of all general election candidates at the same time. In explanation of this state interest the State quoted a section of the oral opinion of a three judge district court in *Auerbach* v. *Mandel* [13] which stated that the state has a legitimate interest in requiring that all candidates be known at the same time. (Br. 37). The Bradley District Court considered this qoute from *Auerbach* and stated that it was "pure dictum." *See* District Court Opinion, AJS. 11a. This description of the nature of the quotation relied upon by the State is particularly telling since Judge Winter authored both the *Auerbach* and *Bradley* opinions. He was thus in a uniquely advantageous position to evaluate the language of the *Auerbach* opinion. In addition to stating that the language from the *Auerbach* opinion was dictum, Judge Winter further observed quite correctly in *Bradley* that the Maryland filing requirement "does not permit all candidates to know all of their opponents at the same time." *See*, District Court Opinion, AJS. 11a.

The State also argues that indentification of all general election candidates simultaneously protects the rights of independent candidates who might be disadvantaged by remaining as uncertified candidates for

[13] No. 74-141-N (D. Md., March 3, 1972), *aff'd* 409 U.S. 808 (1972).

some time after the primary election [14] and protects the rights of the victors of partisan primary elections who might otherwise be surprised at finding a newly certified independent opponent in the field late in the election. The State argues that the filing deadline of March 8 with certification occurring in mid-April removes these possible dangers. (Br. 37-38). This position is nonsensical. First, it ignores the fact that, under the present statutory scheme, the independent candidate is always faced with unknown candidates on the date of his filing. There can be no compelling state interest in preserving this inequity. Second, the State can easily expedite the validation of signatures, just as it expedites the counting of votes. Finally, the likelihood of the success of the petition can be determined easily by those with a substantial interest in the outcome. Moreover, any ephemeral effect which may occur as a result of an independent candidate's certification being made after primary election is obviated by an alternative statutory scheme which was suggested by the Plaintiffs and recognized by the Court below. That alternative is discussed fully in Part I(C) of this Argument, *infra*.

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[14] The State cites as one example of the disadvantage experienced by an independent awaiting certification the difficulties that candidate will experience in collecting money. (Br. 38 and fn. 18). The State recites Mr. Bradley's testimony on affidavit that contributors were awaiting his certification before committing funds. Plaintiffs submit that Mr. Bradley's fundraising problems were distinguishable from the proposition propounded by the State. Mr. Bradley was not a candidate awaiting certification by the State Administrative Board of Elections Laws. Mr. Bradley was in a much more tenuous circumstance. He was a candidate who had been *denied* certification by the Board and who would become a candidate only as a result of this litigation.

The State submits as yet another purported vital state interest the need for full public discussion by all candidates during the primary election. We agree with this proposition and concur that a program which fosters public discussion is beneficial to the electoral process. However, an unreasonably early filing deadline is not only unnecessary to protect that interest, but, in fact, thwarts it. The State improperly concludes that only by an early filing deadline will public discussion be fostered.

It is axiomatic that any statewide independent candidate who at some time during the election year, whether before or after the primary, must gather in excess of 50,000 signatures on petitions, will take advantage of any opportunity to speak to the public on the issues of the campaign. If an independent candidate is running a petition drive, he or she will take every opportunity to gain exposure. As the State properly points out (Br. 38), Mr. Bradley did not take part in active discussion during the primary election campaign. But Mr. Bradley was not conducting a petition drive. He had been denied certification by the State Board of Election Laws and could gain access to the ballot only through the successful completion of major constitutional litigation. His position as a prospective candidate was, at very best, tenuous. Since he had been denied a position on the ballot, campaigning across the state would have been a futile act, at least until the May 17, 1976 District Court opinion in this case.

An independent candidate will reasonably take advantage of any public forum available to the candidate during the petition drive. In an attempt to foster public discussion, then, it is more rational to extend the pe-

tition gathering period to include the high political interest period of the primary election campaign, rather than to terminate the petition drive prior to that time period. The State's present statutory scheme subverts rather than fosters full public discussion.

The final alleged compelling state interest propounded by the State is that the present statutory scheme requiring independent candidates to file nominating petitions in early March in presidential election years allows Maryland voters to participate in an early presidential primary election which assumedly gives Maryland voters an increased role in the selection of presidential candidates. (Br. 39). The May presidential preference primary needs no protection from the Plaintiffs in this case. Neither this suit, the relief sought therein, nor the timing of the independent candidate's petition drive affects in any way the presidential preference primary date. This purported vital state interest is unrelated to independent candidacies.

No compelling or vital state interest has been presented by the State. Thus, the District Court properly found the early filing deadline to be in violation of Plaintiffs' constitutional rights.

D. The State Has Failed To Establish that the Remote Filing Deadline Is the Least Restrictive Alternative Available To Protect Any Valid or Compelling State Interest.

Even assuming *arguendo* that the State has proffered a valid or compelling state interest which is protected by the early filing deadline, the constitutional analysis is not at an end. The State must go further and establish that the actual means chosen to protect that interest, *i.e.*, the March filing deadline, is the alternative which places the least restraint on the exercise of con-

stitutionally protected liberties. *See, e.g., Elrod* v. *Burns,* — U.S. —, —, 96 S.Ct. 2673, 2684-85 (1976); *Kusper* v. *Pontikes,* 414 U.S. 51, 58-59 (1973); *Dunn* v. *Blumstein,* 405 U.S. 330, 342-43 (1972). If any alternative means are available to protect the state's interest, the state may not choose the way of greater interference with constitutional rights. "If [the state] acts at all, it must choose 'less drastic means.'" *Dunn* v. *Blumstein, supra* at 343; *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960). The State clearly has the burden of establishing its compelling state interests. The State also must carry the burden of establishing that the means chosen are the means least restrictive on the exercise of constitutional rights. *Cf. Elrod* v. *Burns, supra.*

The State, both here and before the District Court, failed to consider and balance the varying restrictions imposed on constitutional rights by available alternatives to the remote March filing deadline for independent nominating petitions. Indeed, the State posited no alternatives to its present statutory scheme.

The Plaintiffs consistently have suggested such an alternative. Assuming, for purposes of this discussion, that the State does have a valid or compelling interest in requiring that all candidates for the general election be identified simultaneously (Br. 36), an alternative statutory scheme is readily available which will protect this alleged state interest in a way less burdensome to guaranteed constitutional rights. The Plaintiffs suggested such a scheme before the District Court (Tr. 145-46, 155). Further, the District Court endorsed that proposed scheme. *See* District Court Opinion, AJS. 9a. The scheme provides that an independent candidate

would file his or her certificate of candidacy with the appropriate state officials at the same time as the filing by partisan candidates of their certificates. In 1976, that date was March 8, 1976. The independent candidate could be required to submit at that time, with the certificate, a nominal but not insubstantial number of registered voters' signatures, for instance 1,000 signatures for a statewide office. Then, during the pendency of the primary election campaign, the independent candidate could complete his petition drive. On primary election day, the independent candidate would file the remaining signatures of registered voters. Such a scheme fully protects all the alleged compelling state interest proferred by the State without substantially burdening the Plaintiffs' rights. The early filing of the independent's certificate of candidacy along with the nominal but not insubstantial number of signatures would cause all candidates for one office to be identified simultaneously. The Plaintiffs' proposed scheme would result in all candidates being treated equally. The proposed scheme would foster public discussion since the independent candidate can take advantage of increased voter interest in politics by making numerous public appearances and by utilizing increased media interest as the primary election campaign advances. Further, the proposed scheme would not open the doors to frivolous independent candidates since the independent must still garner the statutorily imposed total number of signatures. For statewide office in Maryland in 1976, that number was 55,155 signatures (A. 16A).

The benefits accruing to the independent candidate are clear. The independent candidate could complete the main portion of the petition drive in a time period during which voter and media interest peaks, during

which increased monetary and volunteer contributions could be expected, during which weather conditions are improved, and during which traditional politically oriented activity is high.

The State spoke briefly to this alternative proposal by the Plaintiffs and endorsed by the District Court. (Br. 37-38). The sole complaint raised by the State in its critique of the Plaintiffs' alternative scheme is that if the independent candidate files the major portion of the required signatures on primary election day, sufficiency of the number of those signatures might not be determined until the validation period had closed. Clearly there exist at least two methods to vitiate any purported difficulties created by this situation. First, the independent candidate could be required to certify on primary election day the gross number of signatures which he or she is submitting. From that number, an informed judgment could be made of the likelihood of the independent candidate's success. The average rate for invalidation of signatures would be applied to that gross number and a clear picture could be developed on primary election day of the possibility of the independent candidate's name appearing on the general election ballot. (A. 39A-40A). Second, in addition to requiring the independent candidate to certify the number of gross signatures presented, the local county election boards could be required to determine the gross number of signatures filed within several days of the primary election date. A mere counting of signatures would be necessary. No more time would be involved than, for example, a detailed count in a closely contested election. Then the identical analysis above described could be applied to that number and a clear picture of the independent's possibility of success could be made.

Based on that clear picture, partisan candidates, the media, potential contributors and the independent candidate could rely on this informed judgment in planning activities during the brief intervening 35 day period from the primary election date to the date for certification of the independent candidate.

The Plaintiffs' proposed statutory scheme is a workable alternative which protects the alleged interests of the State and grants the independent candidate the fullest exercise of constitutional rights.

The State has failed to establish the existence of a valid or compelling state interest requiring protection by means of the early filing deadline. Further, assuming *arguendo* that such an interest has been established, the State has failed to show that the early filing deadline for independent nominating petitions is the least restrictive alternative which is available to protect that interest.

The District Court properly found that the early filing deadline of § 7-1(e) [15] violated Plaintiffs' constitutional rights.

II. THE BRADLEY DISTRICT COURT PROPERLY APPLIED THE PRINCIPLES ENUMERATED IN HICKS v. MIRANDA IN RELYING UPON A DISTRICT COURT OPINION WHICH HAD BEEN SUMMARILY AFFIRMED BY THE SUPREME COURT.

Salera v. *Tucker* [16] is a case decided originally by the Federal District Court for the Eastern District of Pennsylvania which determined that certain portions of the Pennsylvania election laws violated the United

[15] The early filing deadline provisions of § 7-1(e) are presently contained in § 7-1(i). *See*, fn. 1, *supra*.

[16] 399 F.Supp. 1258 (E.D. Pa. 1975), *aff'd*, 424 U.S. 959 (1976).

States Constitution. *Salera* was appealed to the Supreme Court of the United States where it was summarily affirmed. The *Bradley* District Court examined *Salera* in light of the summary affirmance principles enunciated in the Supreme Court's Opinion in *Hicks* v. *Miranda*.[17] The *Bradley* District Court determined that the summary affirmance of *Salera* was binding and *Salera* was applied to the factual situation extant in the *Bradley* litigation. Plaintiffs submit that the *Bradley* District Court properly applied the principles enumerated in *Hicks* and that the *Bradley* District Court correctly relied upon *Salera* in deciding the case below.

Hicks is a recent case which restated this Court's position that a summary affirmance by this Court is a decision on the merits of the litigation below. 422 U.S. at 343-44. This jurisprudential principle of the treatment of summary affirmances has been recognized by this Court in the past. *Ohio ex. rel. Eaton* v. *Price*, 360 U.S. 246, 247 (1959). Further, this principle has been very recently re-affirmed. *Usery* v. *Turner Elkhorn Mining Co.*, — U.S. —, —, 49 L.Ed.2d 752, 765 (July 1, 1976). This treatment of summary affirmance has similarly been applied broadly by lower Federal Courts. *See, e.g., Brady* v. *State Bar of California*, 533 F.2d 502, 503 & n.1 (9th Cir. 1976); *Ingraham* v. *Wright*, 525 F. 2d 909, 918 (5th Cir.), *cert. granted on other grounds*, —, U.S. —, 48 L.Ed.2d 815 (May 24, 1976); *Thonen* v. *Jenkins*, 517 F.2d 3, 7 (4th Cir. 1975).

The State does not attack the teachings of *Hicks;* rather it argues that the *Bradley* District Court improperly applied *Hicks*. (Br. 39-45). Plaintiffs submit that the State is in error in this proposition.

[17] 422 U.S. 332 (1975).

In its *Hicks* analysis of *Salera*, the *Bradley* District Court indicated that *Salera* was binding authority in the case only if *Bradley* and *Salera* are factually indistinguishable and if it could be fairly said that *Salera* decided the issue before the *Bradley* District Court. *See* District Court Opinion, AJS. 8a.

Plaintiffs submit that the *Salera* decision cannot be distinguished in any meaningful manner from the facts extant in *Bradley*. The State argues that the cases are distinguishable since the Pennsylvania election provisions contained burdens in addition to an unreasonably early filing deadline and that the totality of the burdens in *Salera* caused the statutory scheme to be declared unconstitutional. (Br. 43-44). The Plaintiffs submit, however, that the unconstitutionality of the Pennsylvania filing deadline which fell 218 days before the general election was the sole issue decided by *Salera*.

In *Salera*, the plaintiffs challenged certain provisions of the Pennsylvania Election Code on two principal bases. The first general claim alleged that a 3-week limitation on gathering signatures for nominating petitions for an independent candidate was a violation of the Fourteenth Amendment. The three-judge court rejected this claim, holding, on the basis of *Storer* v. *Brown*, 415 U.S. 724 (1974), that, "the three-week period is constitutional as applied to plaintiffs." 399 F. Supp. at 1265.

The court then passed on to the second claim of the plaintiffs—that a requirement for filing signatures on nominating petitions on a date far in advance of the general election was constitutionally impermissible. There can be no doubt that the court divorced the two issues completely, and in no way treated them on a

theory of "totality." In this regard, the *Salera* court stated:

> The second half of plaintiff's challenge to § 2913 (b) and § 2913(c)—that the period for gathering signatures on nominating petitions is so remote from the general election that it substantially impairs plaintiffs' ability to appear on the ballot or to vote for otherwise qualified candidates—*raises different issues than were raised by plaintiffs' challenge to the three-week limitation.* 399 F. Supp. at 1266 (emphasis added).

Following this express severing of the two issues, the court in *Salera* went on to hold that a requirement for filing signatures on petitions by a date far removed from the general election was unconstitutional. 399 F. Supp. at 1269. According to the clear words of the *Salera* decision itself, *Salera* was a one issue case. The *Bradley* District Court so found. (AJS. 9a).

An examination of the Pennsylvania and Maryland election codes, insofar as they relate to the timing of the filing of nominating signatures, thus becomes crucial. In *Salera*, the Pennsylvania Election Code required that the signatures be filed 218 days before the general election and 49 days before the primary election. 399 F.Supp. at 1266. Under the Maryland Election Code, the nominating signatures for independent candidates are required to be filed 239 days before the general election and 70 days before the party primary election. Since the sole issue decided in *Salera* was that the filing deadline for independent nominating petitions was unreasonably early, and since the Maryland filing deadlines fall even earlier than those in *Salera*, the *Salera* situation is indistinguishable from the *Bradley* case.

From this determination, the *Bradley* District Court went to a second analytical level and determined what issue was presented to the Supreme Court in its summary affirmance in *Salera*. The *Bradley* District Court examined the jurisdictional statement filed by the Commonwealth of Pennsylvania and the motions to affirm filed by the various plaintiffs in *Salera*. *See,* District Court Opinion, AJS. 8a. Although the jurisdictional statement and motions to affirm noted in passing the three-week period for the collection of signatures, the *Bradley* District Court noted that none of the papers filed with the Supreme Court argued that the result reached in *Salera* was based either in whole or in part on the three-week collection period. *Id.*

The *Bradley* District Court determined on the bases of the dichotomized nature of the *Salera* opinion and the content of the *Salera* jurisdictional statement and motions to affirm, that one and only one issue was presented to the Supreme Court for its ultimate determination to summarily affirm. That issue was the unreasonably early filing deadline.

The *Bradley* District Court's dual level of analysis is clearly suggested by the Supreme Court's own analysis of a prior summary affirmance. In *Gibson* v. *Berryhill*,[18] the Supreme Court examined the jurisdictional statement and motion to affirm filed in *Geiger* v. *Jenkins*,[19] a case which the Supreme Court had summarily affirmed earlier, to determine the factual situation existing in the earlier case. 411 U.S. at 576. The Supreme Court then analyzed *Geiger* for possible bases

[18] 411 U.S. 564 (1973).

[19] 401 U.S. 985 (1971).

upon which to distinguish it from the litigation the Court was then considering. 411 U.S. at 576-77. This is the precise analysis undertaken by the *Bradley* District Court in its consideration of the *Salera* opinion. That analysis properly implemented the principle enunciated in *Hicks* v. *Miranda, supra.*

The State argues on Brief that the *Bradley* District Court did not take full cognizance of the import of three prior Supreme Court summary affirmances of district court cases which involved § 7-1(e) of the Maryland Election Code. *See Auerbach* v. *Mandel,* Civ. No. 74-141-N (D. Md., March 3, 1972), *aff'd* 409 U.S. 808 (1972); *Maryland People's Party* v. *Mandel,* Civ. No. 72-865-K (D. Md., Sept. 5, 1972), *aff'd* 410 U.S. 901 (1973); *Wood* v. *Putterman,* 316 F. Supp. 646 (D. Md.), *aff'd* 400 U.S. 859 (1970). However, none of these cases presented to the Supreme Court the issue of the constitutionality of the early filing deadline.

Auerbach v. *Mandel, supra,* was relied upon heavily by the State in arguing that the Supreme Court has approved by summary affirmance the early filing deadlines imposed by Maryland. (Br. 37). Despite the fact that the *Auerbach* District Court did comment on the burdens imposed by the early filing deadline, the constitutionality of that provision was not decided in *Auerbach.* The *Auerbach* District Court stated:

> Now having stated our views as a matter of statutory construction, it seems to us that there is no constitutional question which the suit of the People's Party raises, and as a consequence, we find no basis for giving relief in accordance with the prayers set forth in that complaint.
>
> Jurisdictional Statement, *Auerbach* v. *Mandel,* No. 71-1592, at 29.

The *Auerbach* District Court then went on in dictum to comment upon Maryland's early filing deadline. The *Bradley* District Court considered the *Auerbach* comment on the filing deadline and branded it as pure dictum. *See* District Court Opinion, AJS. 11a. The *Bradley* District Court was in a uniquely knowledgeable position to comment upon the weight to be given the *Auerbach* comments. Two of the members of the *Auerbach* three judge panel were members of the *Bradley* panel. In addition, the author of the *Bradley* opinion, who described relevant portions of the *Auerbach* opinion as pure dictum, authored the *Auerbach* opinion as well. The *Bradley* District Court correctly concluded that the Supreme Court did not summarily affirm this dictum and was correct in concluding that *Auerbach* was not binding law on the constitutionality of Maryland's early filing deadline.

Maryland People's Party v. *Mandel, supra,* involved issues identical to those presented in *Auerbach.* The *Maryland People's Party* District Court dismissed the complaint based solely upon the Order and Opinion in *Auerbach. See Maryland People's Party* v. *Mandel,* Order, No. 72-524, Jurisdictional Statement 8a. Thus, *Maryland People's Party,* like *Auerbach,* failed to present to this Court for summary affirmance the issue of the constitutionality of the early filing deadline.

Finally, *Wood* v. *Putterman, supra,* did not consider either the issue of independent candidacies or the burdensome nature of early filing deadlines. *Wood* involved the ability of a local county political party to qualify as a "party," with the ability to nominate candidates by means of a party primary or primary meeting. 316 F.Supp. at 648. The statutory filing

deadlines were merely referred to in dicta. *Id.* at 649. The jurisdictional statement in *Wood* did not raise for this Court's determination on summary affirmance the issue of the constitutionality of the early filing deadlines for independent candidates. *See Wood* v. *Putterman,* No. 70-704, Jurisdictional Statement.

None of the prior summary affirmances submitted by the State as evidence that this Court had determined the constitutionality of Maryland's early filing deadline presented that issue to this Court for determination. The *Bradley* District Court properly discounted the precedential effect and binding nature of this Court's summary affirmances in *Auerbach, Maryland People's Party* and *Wood.* In making its decision below, the *Bradley* District Court scrutinized the *Salera* decision and the various papers filed before this Court in *Salera.* Further, the *Bradley* District Court reviewed and properly discounted all prior summary affirmances which involved in any alleged manner the early filing deadline for independent candidates in Maryland. The *Bradley* District Court deemed itself bound by this Court's summary affirmance of *Salera. See* District Court Opinion, AJS. 12a. Plaintiffs concur in that determination.

CONCLUSION

The decision below is manifestly correct and can be affirmed on either of two grounds. First, the District Court was bound by this Court's summary affirmance of *Salera* v. *Tucker, supra.* The *Bradley* District Court keenly scrutinized *Salera* and other decisions of this Court relating to the Maryland filing deadline for independent candidates' nominating petitions. On this analysis, the District Court properly found that it

was bound by the legal determination made in *Salera* under this Court's teaching in *Hicks* v. *Miranda, supra.*

Second, the *Bradley* District Court undertook a traditional constitutional analysis of Maryland's statutory scheme. The *Bradley* District Court determined that the early filing deadline substantially burdened the rights of the Plaintiffs herein and that the deadline was not justified by any compelling or vital state interest. Further, even assuming that a compelling state interest was established, the State failed to show that the means chosen to protect that interest placed the least restrictions possible on the exercise of constitutional rights.

Plaintiffs submit that the provisions of § 7-1(e) of the Maryland Election Code, now codified at § 7-1(i)[20] violate the rights of the Plaintiffs as guaranteed by the First and Fourteenth Amendments to the United States Constitution, and that the decision of the District Court should be affirmed.

Respectfully submitted,

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[20] See fn. 1, *supra.*